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IT IS SO ORDERED.

Dated: April 03, 2013



  
Jeffery P. Hopkins  
United States Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re

**GLC LIMITED**

Debtor

Case No. 11-11090  
Chapter 11  
Judge Hopkins

**GLC LIMITED**

Plaintiff

Adversary Case No. 12-1008

vs.

**MARK DYLESKI**

Defendant

ORDER GRANTING DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT

This is a fraudulent transfer action. Before the Court is a motion for partial summary judgment ("Motion")(Doc. 30) filed by the Defendant, Mark Dyleski ("Dyleski"). See also Docs. 28, 38 and 49.

#### THE AMENDED COMPLAINT

According to the amended complaint filed by the Plaintiff, chapter 11 debtor GLC Limited ("GLC"): (1) the former principals of GLC operated a Ponzi scheme; (2) Dyleski invested \$450,000<sup>1</sup> with GLC; (3) Dyleski received \$657,083.61 from GLC; and (4) the difference constitutes fictitious profits subject to avoidance under state and federal fraudulent transfer law. Alternatively, GLC seeks the recovery of all transfers to Dyleski based upon the allegation that Dyleski did not make or receive any payments from GLC in good faith.

#### THE MOTION

Dyleski does not dispute that he received \$657,083.61 from GLC. He does dispute the amount that he invested. According to the Motion, Dyleski should be credited for an additional \$400,000 investment that he made through a separate entity named Donnan & Dyleski, LLC ("D&D"). If so, that would result in a determination that he received no fictitious profits if his investments exceeded his returns.

GLC argues that Dyleski is not entitled to credit for funds invested by a separate legal entity.

#### ISSUE

For purposes of determining whether Dyleski received fictitious profits from GLC, should Dyleski receive credit for a \$400,000 payment he made to D&D, which D&D invested in GLC?

#### TODD DONNAN

Dyleski formed D&D with Todd Donnan ("Donnan"). They formed D&D for the purpose of investing in GLC. D&D invested \$550,000 in GLC. To fund this investment, Dyleski paid D&D \$400,000 and Donnan paid D&D \$150,000.

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<sup>1</sup> In opposition to the Motion, GLC argues that Dyleski's payments to GLC total \$350,000. See Doc. 38. Specifically, GLC contends that Dyleski is not entitled to credit for a \$100,000 payment made to GLC by AI Insurance on behalf of Dyleski on December 31, 2008. GLC's position contradicts its amended complaint, which alleges that Dyleski made payments totaling \$450,000, including a \$100,000 payment made on December 31, 2008. See Doc. 51 at ¶¶ 2 and 11.

During the administration of the GLC bankruptcy case, GLC commenced an adversary proceeding against Donnan. The parties settled the action. As part of the settlement, Donnan assigned to GLC all rights and interests that Donnan possessed against GLC, including Donnan's interest in any proof of claim.

#### D&D PROOF OF CLAIM

D&D filed a proof of claim ("Claim") in the GLC case for a \$550,000 investment. The Claim attributed \$400,000 of the D&D investment to Dyleski and \$150,000 to Donnan.

GLC filed an objection ("Objection") to the Claim, seeking to reduce the Claim to \$400,000. The Objection stated:

\$400,000 of the amounts asserted in the Claim are attributed to amounts allegedly due and owing Mr. Dyleski and \$150,000 of the amounts asserted in the Claim are attributed to amounts allegedly due and owing Mr. Donnan. As part of an agreement reached between the Debtor and Mr. Donnan in connection with the compromise of certain claims between the parties, the amounts asserted in the Claim as being attributed to Mr. Donnan have been resolved and are no longer due and owing.

Consequently, GLC asked the Court to "reduce the Claim by the \$150,000 portion of the Claim attributed to Mr. Donnan."

The Objection did not elicit any responsive pleadings. Upon the expiration of the notice period, GLC tendered a proposed order and the Court entered it. The order ("Order") sustained the Objection, reducing the Claim to \$400,000.

#### JUDICIAL ESTOPPEL

Dyleski contends that GLC is estopped from arguing that D&D is a separate legal entity because GLC did not treat D&D as a separate legal entity in its Objection. The Court agrees.

Judicial estoppel prevents a party from asserting an argument when the party prevailed on a contrary argument in an earlier phase of litigation. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The doctrine protects the integrity of the judicial process. *Id.*

Among others, courts look to the following factors to determine the applicability of the doctrine: (1) whether the latter position is "clearly inconsistent" with the former; (2) whether the court accepted the former position, so that acceptance of the latter position would create the impression that a court has been misled; and (3) whether the party asserting the inconsistent position "would derive an unfair advantage or impose an unfair

detriment on the opposing party if not estopped."<sup>2</sup> *Id.* at 750-51.

In this proceeding, GLC argues that D&D must be treated as a separate legal entity from Dyleski. However, GLC's Objection did not treat D&D as a separate legal entity from Donnan. The Objection asked the Court to look beyond the corporate entity and reduce the Claim by the amounts paid to D&D by Donnan. That position is "clearly inconsistent" with GLC's position in this action, that Dyleski cannot look beyond the corporate entity and take credit for amounts paid to D&D by Dyleski.

The Court accepted GLC's former position by entering the Order, reducing the Claim by the amounts paid to D&D by Donnan. Acceptance of GLC's position in this action could lead to the perception that GLC misled the Court.

GLC would derive an unfair advantage if the Court accepted its position in this action. A party may not assert a contradictory position simply because its interests have changed. *Id.* at 749. Moreover, Dyleski, who owns the controlling interest in D&D, may have caused D&D to oppose the Objection had he known that GLC would assert a contrary position in this action.

Accordingly, GLC is estopped from arguing that Dyleski cannot receive credit for amounts paid to D&D by Dyleski and invested in GLC.

#### CONCLUSION

For the foregoing reasons, the Motion is **GRANTED**. Dyleski is entitled to receive credit for the \$400,000 payment he made to D&D, which D&D invested in GLC. Therefore, Dyleski did not receive fictitious profits from GLC because his investments exceeded his returns.

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<sup>2</sup> GLC argues that judicial estoppel is inapplicable because GLC did not assert its prior position under oath. See *Valentine-Johnson v. Roche*, 386 F.3d 800, 811 (6<sup>th</sup> Cir. 2004) ("In order to invoke judicial estoppel, Valentine-Johnson must show that the Air Force 'took a contrary position under oath in a prior proceeding and that the prior position was accepted by the court.'"). Contrary to GLC's argument, *Valentine-Johnson* concluded that a motion, combined with the movant's certification under Fed. R. Civ. P. 11(b), was analogous to a position under oath. *Valentine-Johnson*, 386 F.3d at 812. *Valentine-Johnson* went on to suggest that an oath is not an inflexible requirement for judicial estoppel (noting that "there are no inflexible or exhaustive prerequisites" for judicial estoppel). Although an oath is not an inflexible prerequisite, GLC's Objection is analogous to a position under oath.

GLC also believes "intentional misconduct is a necessary element." See *In re Parker*, 391 B.R. 411, 416 (Bankr. S.D. Ohio 2008). Stated differently, "it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.'" *New Hampshire*, 532 U.S. at 753. Again, there are no inflexible prerequisites to judicial estoppel. *Id.* at 751. Nevertheless, GLC's response to the Motion never suggests that GLC's prior position was the result of mistake or inadvertence. Instead, GLC stands on its prior position, believing the two positions are consistent.

The sole remaining issue in this adversary proceeding, not addressed by the Motion, is whether GLC may recover all transfers to Dyleski based upon the allegation that Dyleski did not make or receive any payments from GLC in good faith. That issue is the subject of a separate summary judgment motion that is not ripe for adjudication. See Doc. 31.

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